No. 16119

In the

United States Court of Appeals

For the Ninth Circuit

D. W. CLARK and UNION OIL COMPANY OF CALIFORNIA, a corporation,
Appellants.

vs.

MURRAY D. AGATE, Trustee in Bankruptcy of the Estates of ALTON C. SIMMONS, CECELIA MAE SIMMONS, ALVIN L. SIMMONS, ODA JANE SIMMONS and LAWRENCE W. SIMMONS, individually and as co-partners, dba ALPINE LODGE,
Appellee.

Appellee's Brief

On Appeal from the United States District Court for the District of Oregon

Honorable WILLIAM G. EAST, *District Judge*

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APPELLEE'S STATEMENT OF THE CASE

Because appellants' statement of the case is in some espects inaccurate and argumentative, the following tatement is submitted.

On August 9, 1954 Alton C. Simmons and Cecilia Mae Simmons filed voluntary petitions in bankruptcy and were adjudicated bankrupts. On August 10, 1954 Alvin L. Simmons, Oda Jane Simmons and Lawrence W. Simmons filed voluntary petitions in bankruptcy and were adjudicated bankrupts. R. 10. Said five bankrupts constituted all of the general partners of the partnership doing business as Alpine Lodge. R. 10.

Within four months of the filing by said general partners of petitions initiating proceedings under the Bankruptcy Act the partnership made four preferential transfers (R. 17, 18) which the District Court declared voidable preferences. R. 23.

On March 25, 1955 the trustee in bankruptcy of the individual estates of the general partners, plaintiff-appellee herein, applied to the Referee for adjudication of the partnership pursuant to section 5 (i) of the Bankruptcy Act. See Exhibit 1. Pursuant to the trustee's request, an order was entered on March 31, 1955, whereby the partnership was adjudged bankrupt. R. 20.

Appellee disagrees with the statements contained at page 3 of appellants' brief reciting that no petition or other document, whose purpose was to bring firm assets under the Court's jurisdiction, was filed by or against the partnership until March 25, 1955. As will later appear in appellee's argument, the filing of the petitions

by all of the general partners did bring the partnership assets under the court's jurisdiction.

The filing of the voluntary petition by the partners for adjudication of the partnership after the partnership was already adjudicated was mere surplusage. Upon adjudication of the partnership the Referee requested that partnership schedules be filed. There was attached to said schedules a voluntary petition executed by the partners, but as stated above said voluntary petition had no effect in this proceeding and no action has ever been taken thereon.

QUESTION PRESENTED

Were the transfers here involved made within four months before the filing by or against the partnership of the petition or petitions initiating proceedings under the Bankruptcy Act?

SUMMARY OF ARGUMENT

The petitions which initiated proceedings by the partnership under the Bankruptcy Act were the individual petitions of all the general partners, and the transfers involved were made within four months before the filing of said petitions.

It clearly appears that Congress intended automatic adjudication of the partnership without further petition

where all general partners are bankrupt. In such a case, the only petitions involved are the petitions of the individual partners. Those are the petitions which, in this case, initiated proceedings by the partnership under the Bankruptcy Act. The preferential transfers were made within four months of the filing of the petitions initiating proceedings under the Bankruptcy Act and were properly held voidable preferences by the District Court.

ARGUMENT

Section 5 (i) of the Bankruptcy Act provides as follows:

> "Where all the general partners are adjudged bankrupt, the partnership shall also be adjudged bankrupt."

Section 60 a (1) of the Bankruptcy Act provides as follows:

> "A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and *within four months before the filing by or against him of the petition initiating a proceeding under this Act*, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class." (Emphasis supplied)

Section 1 (24) of the Bankruptcy Act provides as follows:

> " 'Petition' shall mean a document filed in a court of bankruptcy or with a clerk thereof *initiating a proceeding under this Act.*"

The definition now contained in Section 1 (24) of the Bankruptcy Act was last amended by Public Law 456 approved July 7, 1952. The reasons for this amendment are stated in House Report No. 2320 on S. 2234, 82nd Congress, Second Session (1952) 3 as follows:

> "The present definition is not comprehensive, and is awkward. It now means a voluntary or involuntary petition initiating an ordinary bankruptcy proceeding and does not include the 'original' petition under the debtor relief chapters. It should mean whichever petition first invoked the benefits of the act, either the ordinary bankruptcy petition or the original petition under a debtor relief chapter. The definition contained in the bill also avoids the cumbersome reference in several sections of the act, to 'the petition in bankruptcy or the original petition under' the recited debtor relief chapter. Thus, where as in Section 67, the time period is to be computed with reference to the date of the filing of the petition, it is the first petition which invokes the benefits of the act, namely, the ordinary bankruptcy petition or the 'original' debtor relief petition, as the case may be."

mative authority for the administration of the partnership estate where proceedings are instituted against all the partners as individuals. However, the Act of 1938 has supplemented the old section by specifically providing that where all the general partners have been individually adjudged bankrupt, the partnership shall also be adjudged bankrupt. Under this additional provision, therefore, *the partnership property will necessarily be administered in the bankruptcy court whenever all the general partners have been individually adjudicated bankrupt.*" (Emphasis supplied)

It appears that Collier is firmly of the opinion that where all partners are adjudicated bankrupt, no further petition is required and the partnership will be adjudicated without further petition. If the partnership is adjudicated without further petition, then it is obvious that petitions initiating proceedings under the Bankruptcy Act are the petitions of the individual partners.

Clearly expressed legislative intent that when all general partners are adjudicated bankrupt, *the partnership shall be adjudicated without further petition* is found in House Report No. 1409 on H. R. 8046, 75th Congress, First Session (1937) at page 35 where the following appears:

"9. Amendments to Provide a More Workable Partnership Section.

"The principal new provisions in this connection are that * * *

"(c) Where all general partners are individually adjudicated, the partnership entity itself, *without further petition*, is also adjudged bankrupt."

* * *

"(c) Automatic Adjudication of Partnership.

"Section 5 (i). Where all general partners are individually adjudged bankrupt, the partnership entity itself, *without further petition*, is also adjudged bankrupt." (Emphasis supplied)

The same legislative intent is clearly expressed in Senate Report No. 1916 on H. R. 8046, 75th Congress, Third Session (1938) where the following appears at p. 12:

"Where all general partners are individually adjudicated, the partnership entity itself, *without further petition*, may also be adjudged bankrupt." (Emphasis supplied)

The following appears in Weinstein, The Amendatory Bill in the Present Congress, 11 Journal of the National Association of Referees in Bankruptcy 63, 64 (January, 1937):

"The new § 5 also provides that where all the general partners are individually adjudged bankrupts, the partnership itself shall be adjudged a bankrupt

without the necessity of a separate petition for that purpose. The reason for this change is obvious."

All authorities seem to agree that no further or separate petition for adjudication of the partnership is required where all general partners are adjudged bankrupt. What then is the petition which initiates proceedings under the Bankruptcy Act by the partnership? The only logical answer is that it is the last petition filed by a general partner. On that date all of the partners' interests in the partnership passes into the bankruptcy court and the partnership is in a position to be adjudicated bankrupt *without further petition.*

Appellants argue at pages 8 and 9 of their brief that under the Bankruptcy Act of 1938 the partnership is considered an entity separate and apart from the members of the partnership. Appellants cite 1 Collier on Bankruptcy, 14th Ed., pps. 691, 692 and 693. But appellants failed to note that the entity theory is not applied completely and that Section 5 (i) represents a departure from strict application of the entity theory. At 1 Collier on Bankruptcy, 14th Ed., p. 707 the following appears:

"It is obvious that subdivision *i* represents a departure from the strict application of the entity theory, for adherence to that theory would require that the partnership be the subject of a separate petition having all the requisites of a petition in bankruptcy

without regard to the bankruptcy of the partners as individuals."

Appellants argue at page 12 of their brief that there was no automatic adjudication in this case because "there was a partnership petition in fact". Presumably, appellants mean by their reference to the partnership petition the request filed by the trustee for adjudication of the partnership under Section 5 (i) on the grounds that all general partners were bankrupt, Exhibit 1 herein. But said application filed by the trustee was not a petition initiating a proceeding under the Bankruptcy Act. The Bankruptcy Act contemplates voluntary petitions and involuntary petitions. Voluntary petitions are filed by debtors and involuntary petitions are filed by creditors. The trustee in bankruptcy of the individual estates of the general partners was neither a representative of the partnership qualified to file a voluntary petition, nor was he a creditor of the partnership qualified to file an involuntary petition under Section 59 of the Bankruptcy Act. The application by the trustee was merely a request that the Referee perform the duty imposed upon him by Section 5 (i) of the Bankruptcy Act, that is to adjudge the partnership bankrupt "where all general partners are adjudged bankrupt".

Appellants argue at pages 9 and 10 of their brief that the partnership property was not available in satisfaction of the individual debts of the partners. This, of course, has no bearing upon the instant case, as appellants seem to concede at the top of page 11 of their brief, but in any event all of the property of the general partners was swept into bankruptcy court when all of the general partners became bankrupt. As is observed at 1 Collier on Bankruptcy, 14th Ed., p. 743:

> "* * * the partnership property will necessarily be administered in the bankruptcy court whenever all the general partners have been individually adjudicated bankrupt."

The following appears as a comment upon Section 5 (i) of the Bankruptcy Act in Weinstein, The Bankruptcy Law of 1938 (1938) at p. 27:

> "This was subd. g of the old Act and has been retained unchanged, except for the additional provision that, upon all general partners being adjudged bankrupt, the partnership shall also be so adjudged. Since all the general partners are in bankruptcy, and thus their several estates are being administered by the bankruptcy court, and since the total of their interests in the partnership constitutes the partnership, not only is the partnership property necessarily drawn into the proceeding, but it is only logical and proper that the partnership itself should also be adjudged bankrupt."

It should be noted that appellants have cited not one case, text or congressional report supporting their position. While there seem to be no cases on this point, appellee's position is supported by Collier on Bankruptcy and the Congressional Committee Reports.

CONCLUSION

The clearly expressed legislative intent is that where all general partners are adjudged bankrupt, the partnership shall also be adjudged bankrupt without further petition. It is obvious that the individual petitions of the general partners are the petitions initiating proceedings under the Bankruptcy Act where all general partners are bankrupt. Preferential transfers were made by the partnership within four months of the filing of said petitions initiating proceedings under the Bankruptcy Act and were properly avoided by the District Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

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